

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

INSTITUTE OF CHARTERED ACCOUNTANTS
OF SIERRA LEONE

- APPELLANT

AND

CAPT (RTD) MICHAEL F SPENCER

- RESPONDENT

COUNSEL:

BERTHAN MACAULAY JNR for the Appellant

J B JENKINS-JOHNSTON ESQ for the Respondent

~~For~~
CORAM:

THE HONOURABLE MR JUSTICE N C BROWNE-MARKE, JUSTICE OF APPEAL

THE HONOURABLE MRS JUSTICE A SHOWERS, JUSTICE OF APPEAL

THE HONOURABLE MRS JUSTICE N MATTURI-JONES, JUSTICE OF

APPEAL

Judgment delivered He
GROUNDS OF APPEAL

day of April 2014

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JA

1. This is an appeal brought by way of Notice of Appeal dated 8 October, 2008 by the Appellants, the Institute of Chartered Accountants, Sierra Leone against the Judgment of the High Court, EDWARDS, J Presiding, dated 11 July, 2008. The Grounds of Appeal are to be found on pages 139-142 of the Record.
2. These Grounds are as follows:
 1. The Learned Trial Judge having held that there was no application by the Plaintiff for membership to the Institute of Chartered Accountants of Sierra Leone (the Institute) should have dismissed the Plaintiff's claim in that the Institute could only admit persons to those categories of membership provided for in the Institute of Chartered Accountants of Sierra Leone Act, 1988 (The Act) as there was no evidence before the Court the Plaintiff's Application to the Association of Accountants of Sierra Leone (the Association) was for any one of the categories of membership provided for under the Act.
 2. The Learned Trial Judge misdirected himself when he held, inter alia, that one of the issues that fell for determination was: "...whether the

plaintiff met the criteria as per the ICASL Act, 1988 so as to be eligible for enrolment and or admission as a member of ICASL."

PARTICULARS

The Declaration and Order sought by the Plaintiff in his specially indorsed writ of summons was not that he was eligible for membership simpliciter of the institute but that he was eligible for admission as a '*registered accountant*' of the Institute; a specific category of membership under the Act;

thereby proceeding to grant the Plaintiff a relief that the Plaintiff himself had not sought, to wit, that the Plaintiff be enrolled as a Chartered Accountant of the Institute.

3. Assuming without conceding, that the Plaintiff's application had been transferred/handed over to the Institute, the Learned Trial Judge erred in law and usurped the functions of the Institute in ordering that the Plaintiff be enrolled as a Chartered Accountant without any independent consideration by the Institute of the application.

PARTICULARS

The decision in the first instance as to whether a person's application is successful thereby rendering that person eligible to be enrolled as a chartered accountant is vested in the Council of the Institute as provided for under the Act.

4. The Learned Trial Judge having rightly held that the Plaintiff was not eligible to be enrolled as a '*Registered Accountant*' erred in law in not dismissing the Plaintiff's case but wrongfully proceeded to order that the Plaintiff be enrolled as a Chartered Accountant.

PARTICULARS

- (A) The Plaintiff in his specially indorsed writ of summons had pleaded that he was eligible for admission as a '*registered accountant*' and had not pleaded that he was eligible for admission as a '*Chartered Accountant*'.
- (B) There was no evidence before the Learned Trial Judge that the Plaintiff had applied to be enrolled as '*chartered accountant*' to the Institute or to any entity.
5. The Learned Trial Judge erred when he ordered that the Plaintiff be enrolled forthwith as a Chartered Accountant and a Fellow of the Institute.

PARTICULARS

- (A) The plaintiff had not sought any such remedy/relief from the Court and had not amended his specially indorsed (writ) to include such a remedy and Counsel for the Plaintiff in his address to the Court had limited himself to the relief/remedy prayed for, to wit, that the Plaintiff be admitted as a 'registered accountant'.
 - (B) The Plaintiff, by the Learned Trial Judge's own findings, was not qualified under Section 3(1)b) of the Act, in that he was not a member of a society or institute of accountants approved by regulations of the Council an association of equivalent status to that of the Institute.
 - (C) The Plaintiff had not met the criteria set out in section 5 of the Act in that the Plaintiff had not been a member of the Institute for five years preceding the date of the judgment nor of a body approved by the Council of the Institute.
6. The Learned Trial Judge misdirected himself in referring to the Constitution of Sierra Leone, 1991, Section 8 (3) when he held that 'it becomes relevant to coming to a right conclusion in the handling of this matter that the same shall be considered.

PARTICULARS

- (A) The Learned Trial Judge failed to state which recognised ground of discrimination was in issue in the instant case.
 - (B) The Learned Trial Judge failed to consider section 14 of the Constitution of Sierra Leone, 1991 which provides as follows:
"Notwithstanding the provisions of section 4, the provisions contained in this Chapter (which include section 8(3) shall not confer legal rights and shall not be enforceable in any court of law, but the principle contained therein shall nevertheless be fundamental in the governance of the State, and it shall be the duty of Parliament to apply these principles in making laws.
3. On these Grounds, the Appellant asked that the judgment of the Learned Trial Judge be set aside and that judgment be entered for the Appellant with Costs.

RESPONDENT'S CASE AT TRIAL

4. The Respondent's case at the trial, as recorded in his writ of summons issued on 19 October, 2007 and in his evidence, was that he was an

21

Accountant by profession, having graduated summa cum laude Upper 1st class Honours in Accounting from Bowie State College in the USA in 1977. and having been admitted as a member of the National Society of Public Accountants in the USA in 1981. On his return to Sierra Leone, he was first employed by the then Sierra Leone External Communications Company Limited, SLET, as Chief Accountant/ Secretary, in which position he retired in 2000. In 1984 he applied for membership of the then Association of Accountants. The Association did not respond to his Application. When the ICASL Act came into force in 1988, he got in touch with them, but the new body, i.e. ICASL failed to address his eligibility to become a member of the Institute. However, he continued in practice as an Accountant between 1981 and 2005, in which later year, ICASL notified him by letter that he was not a member of the Institute, and requested that he cease holding himself out as one who was in possession of its practising certificate. The persons in authority in the Institute were the same persons who had been in charge of the now defunct Association of Accountants. The Respondent made two more requests through respective Solicitors that his eligibility for membership of the Institute be determined. The Institute rejected his claims. The Respondent claimed that by their conduct, the Institute were preventing him from practising his profession and securing his livelihood. He therefore prayed the Court below to Declare that he was eligible for admission to the Institute as a Registered Accountant pursuant to Section 3(1) of the ICASL Act, 1988; and for an Order directing the Appellants to enrol and register him as such Registered Accountant of the Institute, and to issue him with a practising Certificate under Section 21 of the Act.

APPELLANTS' CASE AT TRIAL

5. The Respondents filed a lengthy statement of defence on 14 November, 2007. As to the Respondent's averment that he had sent in an Application to the now defunct Association, the Appellants averred that in response to that Application, they had requested the Respondent to provide documentary evidence of his qualifications. They disputed the Respondent's averment that he had sent a letter to the Institute in 1988 as at the date of that letter the Act had not come into force. They averred further that there was no Application from the Respondent which was before the Institute, for consideration; nor, could the 1984 Application to the now defunct Association be imposed upon them. They

22

relied on Section 3 of the Act for the criteria as to eligibility for membership as Chartered Accountants, or, as Registered Accountants. The Appellants contended as well that work at SLET as an Accountant did not confer the status of Practising Accountant upon the Plaintiff. The Appellants relied on Sub-Section 25(2) of the Act. They averred further that Section 21 of the Act expressly provides that a practising Accountant is one who is a member of the Institute and holds a practising certificate issued by the Council of the Institute. The Respondent joined issue with the Appellants on 14 February, 2008 and the action went to trial after Directions were given by EDWARDS, J. The Respondent, through his Solicitors, listed as the issues in dispute, the following: (1) whether or not the Plaintiff is entitled to be admitted to the Institute of Registered Accountants; (2) Whether or not the Plaintiff is entitled to a practising certificate as a registered accountant of the Institute.

6. Whilst giving evidence, the Respondent, as PW1 had this to say, under cross-examination, at page 40 of the Record: "*.....I was not a member of the Institute of Chartered Accountants. I did not hold its practising certificate. Within the law, I am an Accountant. I am not an Accountant within the ICASL Act.....*" The Respondent did not call any other witness.
 7. The Appellants called Mr Nelson-Okrafor to testify on their behalf. He said, inter alia, as recorded at page 41 of the Record: "*..... The Institute never received an Application from the Plaintiff.....we wrote back warning Mr Spencer to desist from practising as an Accountant.....He applied to the Council of ICASL and this Council grants the Application followed by a formal election to membership. To be able to apply for membership one must be eligible and to be eligible, one is expected to have passed the qualifying examination prescribed and approved by the Institute. Each person should have acquired practical training after qualification. To become a Chartered Accountant you must pass the qualifying examination set by the Accountancy bodies. The Council of the Institute is allowed under the Act to determine the examinations which one must pass..... There is another category of Accountants mentioned in the Act and these are the Registered Accountants. To become a Registered Accountant, the provision says that you must have served as an Accountant in private practice 5 years continuously up to the time of the commencement of the Act..... The qualifying examinations are professional examinations.....*" He went on to name the categories of degree holders who could not be classed as Accountants. And under cross-examination as appears on page 43, he said: "*.....I do not know*
- 5

whether the members of the Association of Accountants of Sierra Leone, all became members of ICASL at its commencement of inception.....I became Secretary of ICASL in 1999..... The Plaintiff's eligibility was never put to the Council during my tenure....." The Appellants then closed their case. It is now for us to examine how the Learned Trial Judge treated the issues in dispute as borne out by the evidence led by both sides.

THE INSTITUTE OF CHARTERED ACCOUNTANTS ACT, 1988

8. As of 9 May, 1988, the profession of Accountancy became governed by the provisions of the Institute of Chartered Accountants of Sierra Leone, Act, 1988 (The Act, or, The 1988 Act). 9 May, 1988 was the day the then president signed the Act into Law. Even though there is no commencement date in the Act, Sub-Section 53(3) & (4) of the then Constitution of Sierra Leone, 1978 provided that: "(3) An Act signed by the President shall come into operation on the date of its publication in the gazette, or such other date as may be prescribed therein or in any other enactment; (4) When a Bill which has been duly passed is signed by the President in accordance with provisions of this Constitution it shall become law and the President shall thereupon cause it to be published in the gazette as law." The Act therefore came into operation on 9 May, 1988.

LEARNED TRIAL JUDGE'S JUDGMENT

9. The Learned Trial Judge posed two questions for his consideration at the top of page 63 of the Record: "Firstly, whether there was an application for membership by the Plaintiff to ICASL? And secondly, whether the plaintiff met the criteria as per the ICASL Act so as to be eligible for enrolment and or admission as a member of ICASL?" His answer to the first question was quite unequivocal as appears on the same page: "The answer to this question was that there was no application for membership to ICASL. Worse still perhaps as I have observed, the Plaintiff was not even a member of AASL as his previous application which was acknowledged by exhibit A had not been considered and approved by AASL...." He accepted that the Respondent ".....could not and should not be registered as a member (of ICASL) because he was not a member prior to the Act coming into effect, a member of AASL."

24

10. He continued on the same page unto the following page to consider the Appellants' argument that membership of the company limited by guarantee known as the AASL, did not confer automatic membership of ICASL. But, unhelpfully, he dismissed this argument as "*.....a mindless adherence to technicalities.....*" We do not consider this argument as such. The Appellants' case was that they had not set eyes on the 1984 application, nor had they received any from the Respondent directly. The Learned Trial Judge acknowledged at page 66 of the Record that the 29 April, 1988 letter was directed to the AASL, and not to ICASL, which had not yet come into existence, as evidenced in the address used: PO Box 100 Ludgate House, Freetown. But he went ^{on} to find that Sub-Section 13(1) of the Act meant that "*.....ICASL was expected to and or empowered to continue where AASL had left off.....*" His construction of this subsection is that the 1984 Application and the 1988 letter were part of the property and other hereditaments, books and other instruments which had been kept by AASL and which "*.....should have been handed over to ICASL for them to take action....*" But he acknowledged at the same time that there was no evidence that this was done. In our view, once he had reached the conclusion that there was no evidence to support the receipt by ICASL of the 1984 application and the 1988 letter, he could not then go on to speculate as to what ICASL could have done had it received these documents. A judgment should be based on the evidence adduced during the trial, and not on speculation as to whether a fact was proven or not. Sub-Section 13(1) does not help. Whether or not "*books and other instruments*" include the 1984 application and the 1988 letter, the Learned Trial Judge had found quite conclusively that there was no evidence before him that either or both had been received by the Appellants, and there he should have let the matter rest. We are of the view that the Learned Trial Judge was wrong to conclude as he did at page 67 of the Record that the failure by the Appellants to account for documents which had not been sent to them, but to the defunct AASL, amounted to negligence on their part; and also to conclude that the justice of the case demanded that consideration be given to both documents. The best he could have done, in our opinion, was to have held that the Respondent should simply renew his Application. We do not think we ought to go on to consider, as argued by Mr Macaulay at sub-paragraph 2.3.1 of his synopsis whether such an application "*.....was in respect of any of the categories of membership provided for under the Act which the Institute could grant....*"

7

11. The Learned Trial Judge went on to consider the criteria for registration under the 1988 Act. We shall first refer to Section 3 of the Act which provides as follows:

3(1) Subject to the provisions of section 14 the following persons shall be eligible for membership as Chartered Accountants of the Institute -

- (a) A person who passes the qualifying examinations for membership of the Institute, to be conducted or approved by the Council, and who completes a period of practical training as prescribed by Council.
- (b) A person who is a member of any Society or Institute of Accountants by whatever name called but approved under regulations made by the Council as being in the opinion of the Council an association of equivalent status to that of the Institute: Provided that notwithstanding the approval of any such society or institute the Council may declare that any specified class or description of members of the society or institute shall not be eligible for membership of the Institute:
Provided further that regulations made by the Council under which any society or institute is approved for the purposes of this paragraph may provide as a condition of such approval that a member of such society or institute shall not be eligible for membership of the Institute unless he has undergone such training or acquired such practical experience in the subject of Accountancy as may be specified or prescribed by those regulations.



3 (2) No person shall be admitted to the Institute as a Registered Accountant unless within three months of the coming into force of this Act, he shall apply for such registration and shall satisfy the Council that for the five years immediately preceding the commencement of this Act, he had, as his main source of livelihood, been in continuous active practice in Sierra Leone as an Accountant on his own or in partnership with other Accountants, and is otherwise a fit and proper person to be registered as a Registered Accountant.

12. Section 1 of the Act, defines the various categories of membership. A Chartered Accountant means: "*an Accountant who is enrolled as a Fellow or Associate Member of the Institute established under Section 2.*"

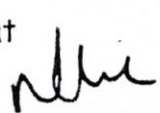
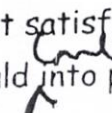

"Registered Accountant" means a member of the Institute who is not a fellow or an Associate Member".

13. As such, there are only two categories of membership. The Respondent's first prayer was for a declaration that he was eligible to be admitted as a Registered Member of the Institute, and not as a Chartered Accountant. The Learned Trial Judge at pages 67-68 of the Record clearly understood this and agreed with Appellant's Counsel, that the Appellants were right in saying the Respondent was not eligible for membership of the Institute under subsection 3(1), nor subsection 3(2) of the Act. Eligibility depended on fulfilling the criteria in subsection 3(2), the most important of which was that the Application for membership should have been sent in within three months of 9 May, 1988, i.e at least against 8 August, 1988. This is the primary criterion for eligibility. The use of the conjunctive "and" in the third line of subsection 3(2) shows that the other conditions following are dependent on the application being made within three months after 9 May, 1988. So, therefore if an application is not made within that period of time, it matters not that the prospective applicant can show that he had as his main source of livelihood, been in continuous active practice as an Accountant on his own or in partnership with other Accountants, and is otherwise a fit and proper person to be registered as a Registered Accountant. And even if we were wrong in this respect, the Respondent has himself said that he was in gainful employment with first, SLET, since 1981, and then, Sierratel, since 1994 until 2000. He could not therefore have been in the words of subsection 3(2) of the Act, *".....in continuous active practice in Sierra Leone as an Accountant on his own or in partnership with other Accountants....."* There was no evidence before the Court below that either SLET, nor Sierratel was a firm of Accountants. And, subsection 25(2) of the Act confirms that this is so: *"25(2) A person who is a salaried employee of the Government or of any other employer shall not, by reason only that he does any act referred to in sub-section (1) in his capacity as such employee, be deemed to be practising as an Accountant."* Irrespective of whether the person in question does all of the things mentioned in subsection 25(1) of the Act, that person cannot be deemed to be practising as an Accountant if he is in employment.
14. The difficulty the Learned Trial Judge found himself in was that, having held that the Appellants were right in their interpretation of subsections 3(1)(a) and 3(2), he went back to interpret subsection 3(1)(b) in isolation. Subsection 3(1)(b) is part and parcel of Section 3. Sections must be read

27

as a whole, and not in their several parts. The Respondent never pleaded that he was eligible to be admitted as a Chartered Accountant. Nor did he, in evidence testify that he was so eligible. His witness statement at page 34 of the Record, which he adopted as part of his evidence-in-chief, is quite clear on this point. He applied for membership of the defunct AASL. He did not specifically apply for either of the two categories of membership recognized under the 1988 Act to the Appellants. The excursus the Learned Trial Judge embarked on into the true meaning and effect of sub-section 3(1)(b) and Section 5 of the 1988 Act, and Sub-Section 8(3) of the Constitution of Sierra Leone, 1991 was therefore quite unnecessary, and must have misled him. A litigant is bound by his pleadings, and by the evidence led by him.

MEANING OF REGULATIONS IN THE ACT

15. Even if we were to hold that he was right to resort to subsection 3(1)(b) of the Act, he would have been faced with the problem of what "Regulation" means in that subsection. 
16. Subsection 170(1) of the Constitution of Sierra Leone, 1991 provides that "*The Laws of Sierra Leone shall comprise - (a).....(b) laws made by or under the authority of Parliament as established by this Constitution; (c) any Orders, rules, regulations and other statutory instruments made by any person or authority pursuant to a power conferred in that behalf by this Constitution or any other law;.....*".
17. Sub-Section 1(1) of the Constitutional and Statutory Instruments Act, 1999 provides as follows: "*Where in any Act, power is conferred on any person or authority to make any proclamation, regulation, order, rule, notice, by-law or any other instrument, the power shall be exercised by statutory instrument.*" Clearly, for the Institute to exercise the discretion conferred on it by subsection 3(1)(b) of the Act, it must do so by regulation, and that regulation must be promulgated in the form of a statutory instrument. Unless therefore, the Institute had promulgated the regulations specified in sub-section 3(1)(b) of the Act, no person who wished to be registered as a Chartered Accountant, could benefit from its discretionary provisions. It is our view, and we agree with Mr Macaulay in this respect, that regulations in the Act can only be made or promulgated by way of Statutory Instrument.
18. We do not think we ought to go on to consider Section 5 of the Act, as we are of the view that an applicant must first satisfy the requirements of Section 3 of the Act, before Section 5 could  into play. It follows also, 

28

that the provisions of Section 21 of the Act, relating to the issuing of a practise certificate, do not apply to the facts of this case.

CONCLUSION

19. In the result, the Appellants' Appeal succeeds. The Judgment EDWARDS, J dated 11 July, 2007 and the Orders made therein, are set aside. The Appellants shall have the Costs of this Appeal, and of the proceedings in the Court below.

If the costs have been paid by the Appellants, they should be refunded. [Signature]

[Signature]

THE HONOURABLE MR JUSTICE N C BROWNE-MARKE, JUSTICE OF APPEAL

A. Showers

THE HONOURABLE MRS JUSTICE A SHOWERS, JUSTICE OF APPEAL

[Signature]

THE HONOURABLE MRS JUSTICE N MATTURI-JONS, JUSTICE OF APPEAL.

9